

## **DWR Migratory Bird Meeting – December 3, 2020**

Elizabeth Andrews, VCPC Director, opened the meeting at 8:34am. There was a brief round of introductions:

- Ryan Brown - DWR Director
- Becky Gwynn - DWR Asst. Director
- Andrea Wortzel - Troutman & Pepper, Mission H20
- Deborah Murray - SELC
- Liz McKercher - Dominion Energy
- Joel Merriman - American Bird Conservancy
- Nikki Rovner - TNC
- Terri Cuthriell - VA Society of Ornithology
- Jonathan Magalski - American Electric Power
- Joseph Lemen - ODEC
- Connie Ericson - Audubon Society of No. VA
- Angel Deem – VDOT (by phone with Golden and Wallingford)
- Amy Golden – VDOT (by phone with Deem and Wallingford)
- Ed Wallingford – VDOT (by phone with Golden and Deem)
- Corey Connors - Virginia Forestry Association (by phone)
- Jason Rylander - Defenders of Wildlife
- Chris Swanson - VDOT
- Ruth Boettcher - DWR
- Angela King - VCPC Asst. Director

Andrews provided a recap of the November 17, 2020 meeting and discussed the goals of today's meeting.

Gwynn thanked attendees for their feedback last month and showed the task list that Boettcher developed based on last month's meeting notes. Approximately twenty tasks were identified, and the majority deal with definitions. Gwynn then shared the Word document with the regulatory language, including track changes to reflect edits since the November meeting. Gwynn noted that comments received from SELC and Troutman & Pepper after the updated draft was compiled have not yet been incorporated but were emailed to the group earlier this week. Gwynn began to summarize the changes. One edit that DWR made throughout is shifting from the term "step-down" plan to "sector-specific" plan.

Wortzel identified comments submitted by VMA regarding the Purposes section to streamline the language so that it better matches the content of the regulation. Additionally, she has concerns regarding references to "habitat" when the Virginia Code sections provided as authority do not reference "habitat". This topic may come up later in the meeting when discussing the habitat definition.

Deem asked for clarification about a VDOT comment suggesting inclusion of language in the framework document to acknowledge which requirements would prevail should there be any real or perceived conflict between this framework document and the subsequent sector-specific plan that is developed. Gwynn noted that DWR would strive to ensure that sector-specific plans are consistent with the framework, but if this continues to be a concern they could incorporate a clarification into the document.

Wortzel noted that one purpose of this regulation is to fill in the gap with respect to federal regulation, but that is not recognized in the current language. She suggested adding language to indicate that this program may be scaled back should a duplicative federal program be established. Murray cautioned against saying it would be scaled back and against addressing now what will be a future decision of the Board of Wildlife Resources. Rovner and Rylander agreed via chat. Andrews asked Wortzel to provide suggested language to Gwynn.

Golden shared details regarding a similar program in California and the consistency determination approach that is utilized there once the federal government adopts regulations. Perhaps that is an approach Virginia could take. Deem said that would be consistent with other programs. Wortzel agreed and said the main goal is to make sure the state and (potential) federal programs work well together. McKercher said the consistency approach or other means of providing clarity would be helpful.

Andrews asked DWR about Wortzel's concern about the inclusion of habitat in the Purposes section and how that will be addressed. Gwynn said DWR has redefined it to reduce confusion, but has not removed it because it is considered an important aspect of the regulation. Wortzel agreed it is important, but the placement within the Purposes section seems to conflict with other sections of the regulation; when talking about a taking using the term habitat in some ways as a surrogate for the birds, we want to be sure the language of the regulation is clear that habitat is a vehicle for preventing the take of birds but not that the take of the habitat is the issue. Gwynn said DWR will consider this. Murray commented that the species and the habitat are inextricably entwined and including habitat in the Purposes section is appropriate. Magalski can see the need to include habitat, but clarification on the definition of what would be considered habitat is necessary because it could be very broad; does it mean nesting habitat? Or habitat for certain bird species? Gwynn noted that some language has been changed in other places of the regulation and these changes may address this concern. Magalski will continue to think about it and perhaps send some suggested language to DWR,

Gwynn began going through definitions and the changes within those provisions to reflect feedback from the group. Ericson asked that the concept of "active nest" include language regarding species which reuse nests year to year, such as ospreys. Murray agreed. Gwynn agreed to consider that addition. Golden asked if this would impact current VDOT practices. Ericson anticipated that it would not because it would be considered an active nest if certain preparatory work was being done by the species. Murray asked for additional time to consult with others at SELC to provide comments. McKercher said bald eagle nests are protected for three years whether they are active or inactive; this is a separate consideration because they

are protected by the federal Bald and Golden Eagle Act. She discussed the need to be able to observe breeding behavior at times to take action to alleviate the hazards associated with nests at certain locations.

Next, Gwynn pointed to language inserted into the regulation to provide clarification regarding the best practices associated with conservation and mitigation plans. Rovner asked for an example when DWR imagines a sector-specific plan would provide for a general permit without a conservation and mitigation plan being required. Gwynn said it is difficult to answer that question because this is new territory for the agency – but perhaps with transmission lines. Rovner said TNC would prefer the requirement of the conservation and mitigation plan to be the default. Murray agreed. Wortzel supports the current approach the agency is taking. Merriman suggested it is probably worthwhile to distinguish between the requirement to develop a mitigation plan and to actually do mitigation. If within the sector-specific plans the applicant is able to agree upon defined best management practices, then a separate mitigation plan may not be required and it does not necessarily mean that compensatory mitigation is off the table. Gwynn agreed and noted that the discussion regarding mitigation is important.

Gwynn identified changes within the best management practices definition to reflect feedback regarding post-construction activities, but noted these changes are still tied to the construction phase. She pointed to the communication towers sector-specific plan that was provided to the group previously as an example. In that plan, there is a reference to lighting that would limit the impact to birds – this is something that can be implemented during construction, but will have a subsequent impact during operations. Brown noted that limiting permit coverage to construction but not operations is appropriate given agency resource constraints. Murray appreciated the resource issues, but asked if it would be possible to consider operational plans for certain industry sectors or geographic areas, or to include in the regulation an intent to come up with operational plans in the future? Brown said it might be possible to think about the industry sector or geographic approach, but not sure of the specifics at this point; and he's unsure that including aspirational language in the regulation about future actions would be appropriate. Andrews noted that Murray had submitted comments suggesting coastal areas as a geographic approach, and that Rovner suggested 200MW wind farms via chat as a possible industry sector to consider. Brown said additional analysis would have to be done to determine what type of staff time and resources would be needed to do this.

Rylander noted that, for certain types of projects, the real impacts on migratory birds will not show up until after construction. He pointed to language about “constructed or installed during the construction of the project” and that this seems to be limited to physical approaches; what about seasonal restrictions and other non-physical things? He suggested adding “implemented” to that sentence perhaps, or some other language to address foreseeable impacts. Merriman noted the primary focus of his position is wind energy and migratory bird take, and post-construction is when the majority of bird take occurs for a wind energy generating facility. He detailed recent activity in this area (CVOW offshore, Rocky Forge onshore, the state's renewable energy goals), and suggested adding language to say that the focus is on construction except for those sectors for which post-construction is identified in the sector-

specific plan. Brown said that may work and also noted that other regulatory programs may cover some of these operational concerns, and we do not want to conflict with those. Merriman said that there are best practices for wind energy that could be referred to. McKercher suggested using “. . . impact, project design (with examples) to avoid or minimize impacts to regulated birds” rather than “post-construction operational phases”. McKercher will share the language she had in mind, and Rylander and Merriman will draft some language as well.

Gwynn moved to the definition of compensatory mitigation, borrowed from existing DEQ (Virginia Water Protection Program) regulations. Rovner said it may be clearer to define mitigation as the three steps and define compensation as just the offsetting action. Gwynn asked Rovner to provide suggested language. Rylander asked about the “creation . . . of regulated bird species” – is this meant to be for habitat as opposed to the species itself? Gwynn said the agency can continue to refine the language borrowed from the DEQ regulation. Murray asked if the regulation it was borrowed from included “regulated bird species”. Gwynn said it did not, it was aquatic resources. Golden asked about the threshold where compensatory mitigation may kick in, and suggested inclusion of a reference to the sector-specific plans. Rovner added that in places where mitigation and its application are discussed, there should be some reference to “no net loss” since that is the goal. Rovner will provide specific suggestions on where to include the language. Merriman said that a mitigation hierarchy is not provided and will provide a definition for it. Wortzel said the Purpose section may be an area to capture the “no net loss” idea and offered to coordinate with Rovner.

Gwynn continued to go through the definitions section and asked that any discussion regarding construction impacts take place later in the meeting when discussing take. Discussion then turned to habitat-related definitions and the definition of take. Golden pointed to “biologically significant avian habitat” and said that is useful for VDOT when thinking about how they identify these things, but the phrase “general avian habitat” is not used elsewhere – are these habitats applicable in the same manner? Boettcher said the entire affected habitat is under regulated habitat, and DWR wanted to make the distinction that the biologically significant habitat is a trigger for an individual permit, a conservation and mitigation plan, or some higher level of review. Rylander also had questions about general avian habitat and whether the distinction should be between pristine and degraded – could there be a biologically significant area that is degraded? Boettcher agreed. Rylander suggested removing the word “not”. Wortzel referred back to the take definition; if the program is focused on the take of migratory birds and not the impact to habitat, then the take definition seems unnecessarily broad. Gwynn noted that given the number of migratory birds that come through Virginia, the agency desires to focus on more than just the nesting season – the HRBT expansion is a good example of a take that occurred outside of the nesting season. Golden asked, via chat, if the habitat types could be combined. And Rylander noted, via chat, that the full life cycle impacts are critical. Merriman noted that the general avian habitat could be tweaked to be a catchall of what is not included in the amended definition of 11(a). Gwynn agreed that these comments will be taken into account.

Other updates to definitions are found in commercial projects, industrial projects, and regulated habitat. Wortzel asked if sector-specific plans will be developed for each project type identified

under commercial and industrial, or is there another purpose? Gwynn said the intent is to provide information to clarify what is meant by commercial or industrial. Cuthriell asked for clarification regarding “sector” – is it a type of industry or type of commercial operation? Additionally, how are the sector-specific plans going to be developed? Gwynn said that if the Board of Wildlife Resources takes action on this framework regulation, then agency staff will proceed with the development of the sector-specific plans – commercial, industrial, electric transmission, etc. It is likely this would be done in some sequence rather than all at one time. Regarding the definition of sector, Gwynn said the agency could provide additional language to clarify what it is meant.

Rovner suggested an alternative approach – regulated activity is defined as an activity covered by a sector-specific plan adopted by the Board (the plan is the trigger). If you want to signal to the regulated community what the Board may adopt sector-specific plans for, rather than do this in the definition section, you could just have a separate section that says “the Board may adopt sector-specific plans for the following”? Additionally, Rylander asked, via chat, if commercial buildings could be included, with an eye toward BMPs for bird-safe glass to minimize collisions. Via chat, Cuthriell strongly supported the inclusion of bird-smart building specifications during construction for certain classes of buildings. She also noted that Rovner’s suggested approach makes sense. Gwynn will consider these comments.

Merriman turned to the paragraph within industrial projects discussing exemptions, specifically the small renewable energy projects. He said 150 MW facilities are not necessarily considered “small” and this seems like a high threshold. Rovner noted, via chat, this reflects the definition of small renewable energy projects within DEQ Permit by Rule (PBR) regulations, but agreed it is high. Gwynn noted that the agency will consider these comments in further revisions. McKercher noted that as part of that PBR process, there are often migratory bird plans – perhaps move away from using the language of “exempt” and rather focus on how these types of concerns are handled through the PBR process rather than here in the DWR regulations.

Golden asked DWR to consider consistency throughout the definitions regarding how the species and the species habitat is handled. McKercher pointed to the definitions of habitat, and noted that it would be helpful to not use the word “habitat” when defining habitat and to provide more detail instead - does it mean trees, grasslands, water, biotic and abiotic features, etc.? Also, what is the rationale behind the exemption for silvicultural activities? Brown said the agency can put in a definition of habitat that addresses this concern. Via chat, Murray noted that the language “have been designated as biologically impacts” should instead read “biologically important”.

[Break from 10:24am to 10:35am.]

Gwynn continued through the updated document. Murray asked if Sections C (requirement for a permit) and F (permits) could be merged in some way. Rovner also said 1 and 2 in Section C are unclear. Murray offered to draft replacement language. Wortzel suggested an exemption section that is standalone to make it clear what actions are exempt. And, with respect to Section

C(2), she noted that the language seems to say that a permit is required for incidental take whether or not there is a sector-specific plan for that activity. Gwynn said this provision speaks specifically to T&E species and the separate regulatory program that exists in that area. Merriman expressed concern with Section D – should we put additional parameters on how those sector-specific plans will be developed and associated timeframes, to avoid unnecessary delay or gaps in having something in place? Brown said the plans will be developed by regulatory processes similar to this and other agency actions, and the risks of delay are inherent and we cannot eliminate them by adding language here; but he noted that he understands the point.

Rovner asked about permit term and the issue of covering operations – one benefit is that if there is a take under a permit, then there is an opportunity to mitigate; but if there is no permit coverage and there is a take, it is a violation of state law subject to criminal charges. That is something to consider when thinking about this. Wortzel said this is why she asked about Section C(2) above – has there been consideration of some kind of general permit coverage? Andrews noted that the agency's enforcement authority was raised at the last meeting. Gwynn said language was added to the enforcement provision concerning the agency's ability to inspect permitted actions.

Regarding mitigation, in general permit subsection c, Rovner suggested that this is a place where the no net loss concept can be placed. She additionally suggested changing “may” to “shall” within the general permit sentence re: being required to mitigate. Wortzel said she can understand a “shall” in the individual permit context, but suggested keeping it as “may” with respect to general permits with additional details handled via mitigation plans. She provided an example of one regulated bird flying into the glass window of a commercial building and being killed – would that require mitigation? Merriman suggested including a reference to the sector-specific plans, if those thresholds are identified there. Rovner noted that the example provided by Wortzel might be an appropriate situation for payment into an in lieu fee fund as mitigation. Magalski said under the individual permit mitigation, it just references “permittee responsible” compensatory mitigation; so does that take other options such as in lieu fees off the table? Gwynn said yes, but they could amend the language to add options back in if desired.

Murray suggested some wordsmithing – the initial language in both the individual and general mitigation sections (“the department expects that the effects”) could be modified. And, regarding Magalski's comment, what do we mean by compensatory mitigation? McKercher said that under the general permit mitigation language, she agrees with Wortzel that the language in the last sentence should remain “may”. Additionally, to follow up on Magalski's comment – mitigation has been going on in the surface water context for decades; the federal mitigation rule in 2008 said that demonstrated data and experience showed that there are times when banks and in-lieu fee funds are ecologically preferable. She therefore would prefer to include these as options. Rovner agreed. Gwynn will take these comments into consideration. Merriman asked if we think the same level of data and certainty they have for wetlands exist here with respect to birds? McKercher recognized it is different with respect to birds, but there is a lot of expertise and similar management. She noted that in Florida there is a lot of species mitigation. Magalski

said there are not species banks today but he thinks the market would come because we are seeing it happen in other areas (such as eagles and ESA). Rovner added that if it is allowed, it would need to be allowed in a manner so that DWR can determine if it is sufficient. Brown said this regulation needs to reference that mitigation will be available in a general sense, then between now and when sector-specific plans are developed, the discussions will focus on what the mitigation actually looks like. DWR would appreciate feedback on when mitigation would be required, what mitigation would look like, and what additional authority may be needed. Andrews asked if attendees would like to comment on this now, or provide this feedback after further conversations with their colleagues. Murray asked, via chat, about the timeframe for submitting these comments. Brown said as soon as possible. Wortzel said submitting written comments will be helpful, the regulated community is interested in not only when mitigation is triggered but also what kinds of ratios would be utilized (rather than it be a new discussion each time).

Gwynn continued through the updated document. Magalski had a comment regarding the permit inspection provision, and suggested inserting language referencing “business days” with regard to the twenty-four hours requirement. Brown made note of this comment. Murray, via chat, noted that there should be a waiver of that in the event of emergency.

Discussion turned to the additions regarding the Biennial Standards and Conditions. Brown noted the intention is to create some efficiencies for industry and the department, where there will be repetitive projects ongoing that are of like type. These will be project-type specific, not permittee specific. The approach echoes the approach of the annual standards and specifications used for the DEQ Erosion & Sediment Control Program. Murray asked how or whether cumulative impacts would be considered. Brown said the agency will consider how to address this. Wallingford asked about enforcement actions – it appears the only option is a criminal one. Rather than going straight to some sort of criminal enforcement, there should be some sort of administrative option – is that a possibility? Andrews noted that this was in the comments that VDOT submitted, and is what she was referencing previously during the discussion re: enforcement. Brown said the intention is what Wallingford noted, that you use the administrative process first. DWR will consider amendments to make this clearer.

Lemen referred back to Murray’s comment about cumulative effects – would this be addressed by each project being permitted separately? He also said permitting a grouping of similar projects together may be another approach – not through this process, but more generally. Theoretically, Brown said if the sector-specific plan is amenable to that it should be possible. Lemen said that kind of flexibility would be helpful and offered to provide feedback during the sector-specific plan development process. Murray said this makes the concern about cumulative impacts even stronger. Magalski said the standards and conditions language is very helpful. In Section H(1) it is clear that a permit application has to be filed for each project, but is it that the process is more streamlined? Brown said, in theory, yes. If an application comes in that references certain standards and conditions, the agency looks to see whether the project is covered by those, so it should be an abbreviated review. Magalski asked about Section H(1)(b) and the “and if applicable any other activity types” language. Brown said the agency can

consider a cleaner way to say this – but basically they mean what activities are the standards and conditions meant to cover and what other types of activities the applicant might be involved in that will utilize the regular process. Magalski also asked if, under Section H(1)(d), the tracking system is a list of projects? Brown said yes, the agency will keep track of what projects the applicant has and vice versa – plus some discussion about the monitoring program. Magalski asked a question regarding Section H(2); the way the language reads, would this void the standards and conditions more generally or would it just void the project that was not compliant? Brown said just the project. Merriman asked for examples of sectors the standards and conditions might apply to. Brown said typically linear projects, such as roadways, transmission lines – ultimately it will be defined by the sector-specific plans. Magalski said he envisioned it to cover linear projects, which are all very similar in nature.

Gwynn moved to the dispute resolution and administrative appeals procedure document. There were no comments.

Andrews asked people to send any comments or feedback after the meeting to Gwynn. Andrews turned back to a previous comment Magalski had regarding habitat and asked if his concern was resolved. He will look at the definition more and provide comments to Gwynn if needed. Merriman asked how soon DWR would like edits/comments regarding the regulation language. Brown summarized next steps with respect to the regulatory language itself. Brown said what the group is currently reviewing is very procedural and lays the groundwork, but does not become operative until the sector-specific plans are developed. Additionally, the group has discussed the state of flux at the federal level. The state administration would like to continue with this current process and see this regulatory language on the agenda at a December 17 BWR meeting. Should the BWR approve the draft language, it would go out for public comment. DWR will be working over the next week or two to further adjust the language so that it is ready for the December 17 BWR meeting, so the sooner the better for comments. However, since the public comment period would run through March, there would still be plenty of time to provide comments via that manner as well. Gwynn noted that staff have a presentation to the Board prior to the December 17 meeting, so ideally comments would be received before then, by Dec. 11; but input is appreciated at any time and the deadlines discussed above are just with respect to getting a draft before the Board initially for consideration before beginning the public comment process. Murray asked for clarification on whether close of business on December 11 is sufficient. Brown said yes. Gwynn will provide the updated draft document (with changes accepted) following today's meeting.

Rovner commented that that these processes typically work best when the working group is able to work through all of the topics to better identify where there is and is not consensus, but understand the timeline is not the agency's determination. Rovner asked if DWR would consider reconvening this group during the public comment process to determine if there is consensus on the provisions. Brown said he understands that and will consider it.



Andrews thanked everyone for their time and input. Gwynn echoed the value of these discussions for the agency. Via chat, multiple attendees expressed appreciation for being involved in the effort. Meeting adjourned at 12:15 pm.